EX PARTE OR LATE FILED

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JAY S. NEWMAN
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(202) 637-9114

December 5, 1994

TELECOPIER (202) 637-9195
TELEX 4938614

VIA HAND DELIVERY

Mr. William Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Cable Home Wiring, MM Docket No. 92-260

Dear Mr. Caton:

In accordance with Section 1.200 et seq. of the Commission's rules, this is to advise that on Monday, December 5, 1994, the attached letter was hand delivered to Jill Luckett, Special Advisor to Commissioner Rachelle B. Chong, Maureen O'Connell, Legal Advisor to Commissioner James H. Quello and Lisa Smith, Legal Advisor to Commissioner Andrew C. Barrett.

Sincerely,

Jay S. Newman

Jay S. Newman
Counsel for Liberty Cable
Company, Inc.

Attachment

JSN:cas

: G:\HR\039\006\CATON.LTR ;

No. of Copies rec'd 0+1
List A B C D E

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December 5, 1994

VIA HAND DELIVERY

Ms. Jill Luckett
Special Advisor to
Commissioner Rachelle B. Chong
FCC - Room 844
1919 M Street, NW
Washington, DC 20554

Ms. Maureen O'Connell
Legal Advisor to
Commissioner James H. Quello
FCC - Room 802
1919 M Street, NW
Washington, DC 20554

Ms. Lisa B. Smith
Legal Advisor to
Commissioner Andrew C. Barrett
FCC - Room 826
1919 M Street, NW
Washington, DC 20554

Ladies:

Enclosed is a letter which was filed with the Commission on November 14, 1994 and which discusses Liberty Cable Company, Inc.'s position in the cable inside wiring proceeding. I thought it may be of interest to you in preparation for our upcoming meeting.

Sincerely,

Jay S. Newman

Jay S. Newman
Counsel for Liberty Cable
Company, Inc.

Enclosure
JSN:cas

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November 14, 1994

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Cable Home Wiring, MM Docket No. 92-260

Dear Mr. Caton:

On behalf of Liberty Cable Company, Inc., enclosed for filing in the docket file of the above-captioned proceeding are an original and four copies of the attached letter which responds to the ex parte letters filed by Time Warner Entertainment Company, L.P. in this proceeding. Please call me if you have any questions concerning this matter.

Sincerely,

Jay S. Newman
Counsel for Liberty Cable Company, Inc.

Enclosures

cc: Patrick Donovan
Lynn Crakes
Julia Buchanan
Larry Walke
Richard Chessen
Jennifer Burton
Marian Gordon

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November 14, 1994

WRITER'S DIRECT DIAL NUMBER

VIA HAND DELIVERY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: Response to Ex Parte Letters --
Cable Home Wiring, MM Docket No. 92-260

Dear Mr. Caton:

In accordance with Section 1.1200 et seq. of the Commission's Rules, Liberty Cable Company, Inc. ("Liberty") hereby submits this response to the ex parte letters filed by Time Warner Entertainment Company, L.P. ("Time Warner") in this proceeding on December 16, 1993, September 9, 1994, September 14, 1994, and September 29, 1994 (collectively, "ex parte letters"). This letter discusses the following points: Liberty's position in the home wiring proceeding; Congressional intent in enacting the home wiring provisions; the Commission's current inside wiring rules are impractical; Time Warner's proposed demarcation point at the wallplate will effectively nullify the cable home wiring rules in multiple dwelling units ("MDUs"); inaccuracies and misstatements contained in Time Warner's ex parte letters; and, Time Warner has used the judicial process to frustrate competition from Liberty.

I. Liberty's Position in the Home Wiring Proceeding.[1/]

Liberty is a satellite master antenna television ("SMATV") operator that is successfully overbuilding and competing head to head in New York City with Time Warner, the local franchised cable company. Liberty currently services approximately 27,000 subscribers at dozens of sites in the New York metropolitan area. Almost all of Liberty's subscribers are in MDUs -- cooperatives, condomin-

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[1/] See generally Comments, Reply Comments, and Petition for Reconsideration and Clarification filed by Liberty in MM Docket No. 92-260 and Comments filed by Liberty in RM No. 8380.

iums and rental apartment buildings. Liberty is a pioneer in the use of the 18 GHz band to provide video services and has built the largest 18 GHz microwave network in the United States.

Liberty wants the Commission to locate the demarcation point for cable home wiring in MDUs at that point where an individual dedicated subscriber line ("Individual Line") connects to the common wiring ("Common Line").[2/] To the extent that a service provider needs to access a junction box or other passive equipment to reach this demarcation point, it is essential that the Commission also classify such equipment as cable home wiring. At a minimum, the Commission should impose an obligation on cable operators to facilitate access to such equipment for the purpose of allowing alternate service providers to connect their Common Line to Individual Lines.

Liberty's proposed demarcation point is a practical one which will accommodate the many different variations in MDU construction. Such a demarcation point will, moreover, moot disputes over whether Individual Lines (and the conduits or molding in which they are installed) belong to the franchised cable operator or the building owner.[3/]

II. Congressional Intent in Enacting the Home Wiring Provisions of the Statute.

A basic premise of the Cable Television Consumer Protection and Competition Act of 1992 was to promote increased competition to

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[2/] Liberty filed a Petition for Reconsideration and Clarification of MM Docket No. 92-260 requesting that the Commission adopt a demarcation point outside the customer's premises and within the common areas of the MDU (e.g., stairwells, hallways, basements, or rooftops) at which the individual subscriber's Individual Line can be detached from the cable operator's Common Line without destroying any part of the MDU and without interfering with the cable operator's provision of service to other residents in the MDU.

[3/] See infra pp. 8-10.

cable by alternate providers.[4/] One means by which Congress intended to promote such competition was by allowing alternate providers to access existing cable home wiring without disrupting the interior of a subscriber's home, making it effortless for the subscriber to switch from cable service to service provided by the alternate provider.[5/] While Congress stated that the home wiring provisions were "not intended to cover common wiring within the MDU building"[6/] [emphasis added], Liberty's proposal contemplates that inside wiring will only include those wires which connect a subscriber to the cable operator's Common Lines (and can be easily detached from the Common Line) without destroying any part of the MDU and interfering with the cable operator's provision of service to its subscribers in the MDU.

III. The FCC's Current Inside Wiring Rules Are Impractical.

In February of 1993, the Commission released its Report and Order in the home wiring proceeding.[7/] The Report and Order complies, in part, with Congress' intent, stating that the definition of cable home wiring is intended to "give alternate providers adequate access to the cable home wiring so that they may connect the wiring to their systems without disrupting the subscriber's premises".[8/]

However, the Report and Order fails to comply with Congress' intent as it defines cable home wiring as "wiring located within the premises or dwelling unit of the subscriber" with the "demarcation point" for cable home wiring in MDUs "at (or about) twelve

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4/ See Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, Sections 2(a)(6), 2(b)(1-2), 106 Stat. 1460 (1992).

5/ See H.R. Rep. No. 628, 102d Cong. 2d Sess. at 118 (1992).

6/ Id.

7/ Implementation of Cable Television Consumer Protection and Competition Act of 1992 -- Cable Home Wiring, Report and Order, MM Docket No. 92-260 (released February 2, 1993) ("Report and Order").

8/ Id. at ¶¶ 11 and 12.

inches outside of where the cable wire enters the outside wall of the subscriber's individual dwelling unit".[9/] This failure (which makes the existing demarcation point practically meaningless) can be attributed to the fact that the Commission was unfamiliar with common MDU construction practices.[10/]

In many MDUs, wire within twelve inches of a subscriber's premises is buried in a brick, concrete or cinder block wall or concealed in a pipe conduit and is not, therefore, readily accessible without causing substantial damage to the building and the subscriber's apartment. Attached as Exhibit A is a diagram illustrating this problem.

Time Warner is patently wrong when it states in its ex parte letters that in the overwhelming majority of MDU buildings in New York City, the cable which is twelve inches outside a subscriber's unit, is located in readily accessible public areas which allows convenient splices. To the contrary, in many MDUs in Manhattan, Time Warner installed its feeder cables in the stairwells of the MDUs. In these MDUs, individual wires run from each subscriber's premises to the cable operator's feeder cables in the stairwells. The Individual Lines joining the subscriber's apartment to the feeder cables in the stairwells are typically not accessible 12 inches outside the subscriber's premises since they are (i) concealed in inaccessible pipe conduits or molding; or (ii) buried in concrete hallway floors.

IV. Time Warner's Proposed Demarcation Point at the Wallplate Will Effectively Nullify the Cable Home Wiring Rules in MDUs.

Time Warner's ex parte letters propose that the Commission adopt a demarcation point for cable home wiring in MDUs where the Individual Line enters the interior of an individual dwelling unit, (i.e., at the wallplate). Time Warner's proposal, if adopted, will create a meaningless demarcation point that completely frustrates the purpose of the cable inside wiring rules.

9/ Id. at ¶¶ 4 and 12.

10/ The Commission's existing cable inside wiring demarcation point is probably appropriate in the context of most single family homes where a location that is twelve inches outside of the home is usually an accessible location.

Under Time Warner's proposal, competitors (such as Liberty) will have only two real alternatives for obtaining access to subscribers in MDUs. First, Liberty would have to compel Time Warner to remove its Individual Lines from internal pipe conduits so that Liberty's Individual Lines could be placed in the conduit.[11/] This would be an expensive and time consuming method of switching cable service. Removing and replacing Individual Lines in conduits each time a subscriber changes video service providers serves no legitimate purpose other than to make the change costly and time consuming. Furthermore, if the cable operator refused to remove its wire from building conduit, then the parties could very readily become embroiled in the kind of litigation and delays the home wiring rules are intended to avoid. Time Warner itself recognized the wisdom of sharing the use of Individual Lines when Time Warner entered into such a sharing arrangement with Liberty at the Horizon Condominium complex. See infra, p. 9.

The second alternative would be for Liberty to install a Common Line in each hallway of each building and enter each individual dwelling unit through a hole over the front door. Liberty would then have to run an Individual Line around the interior of each dwelling unit to either the Time Warner demarcation point at the wallplate or directly to the subscriber's television set. Such an installation will cause the very disturbance to the interior of a subscriber's home that the cable home wiring rules were intended to avoid. MDU owners hate hallway installations and MDU residents hate exposed wires in their home.

Time Warner's wallplate demarcation point is sensible only in the very limited case where the conduit leading to the wallplate is large enough to accommodate two sets of cable and the Individual Line meets the Common Line inside a "gem" box covered by the wallplate. There are only a handful of buildings in New York City with such cable system construction.

[11/] Liberty would be entitled to require the removal of Time Warner's Individual Lines from conduits under the New York City franchise which provides that "[t]he installation of all cables, wires or other component parts of [Time Warner's] system in any structure shall be undertaken in a manner which does not interfere with the operation of any existing MATV, SMATV, MDS, DBS or other distribution system in said structure, including any conduit used in connection with such other system." New York City Franchise, Appendix B, Paragraph B.2.

The cable inside wiring rules are intended to facilitate competition and avoid unnecessary disruptions to the interior of the subscriber's home. Time Warner's wallplate demarcation point, when applied to the real and practical problems of MDU wiring in major urban areas, accomplishes neither of these goals. Instead, it frustrates competition and will cause needless duplicative and unaesthetic wiring of the interiors of apartments.

Liberty's proposed demarcation point where Individual Lines meet the Common Line is, in contrast, readily adaptable and easily applied to all different kinds of cable construction found in MDUs. Liberty's proposed demarcation point eliminates the need to wire an apartment twice and eliminates the pointless removal and reinstallation of Individual Lines in building conduits.

V. Inaccuracies and Misstatements Contained In Time Warner's Filings.

Time Warner's ex parte letters contain false statements, inaccuracies and misinformation, the purpose of which seems to be to confuse the issues and divert attention from the purpose of the inside wiring rules. For example, Time Warner has made numerous unsubstantiated and patently false statements regarding Liberty's marketing and installation practices. Liberty unequivocally denies each of these allegations. In addition, Time Warner attempts to confuse the inside wiring issue by arguing that competing multichannel video programming distributors ("MVPDs") are trying to "unfairly shift the normal costs of doing business" by utilizing existing inside wiring. In reality, competing MVPDs (like Liberty) merely want the demarcation point to be easily accessible so that: (i) consumers truly have a choice about who provides them their video programming; and, (ii) MDUs do not have to be destroyed to provide customers with service.

Moreover, we note that in Time Warner's September 29, 1994 ex parte letter in this proceeding, Time Warner states that Liberty has "urged the Commission to amend the home wiring rules to allow competitors to 'share' home wiring, even while the incumbent cable operator continues to provide cable service over that wiring". Liberty has never so "urged" the Commission in its filings and is unsure how Time Warner could have so grossly misinterpreted Liberty's comments in RM No. 8380.

Finally, Time Warner suggests that the cable home wiring rules may be unconstitutional because they authorize a taking of property without just compensation determined in a judicial proceeding.[12/] However, the cable home wiring rules do not cause a "taking" of property for at least two reasons. First, the home wiring rules do not compel the permanent physical possession of the wiring by a third party. Cf., Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982). Instead, the cable home wiring rules regulate the manner in which the cable home wiring is sold, removed or abandoned upon voluntary termination of the relationship between a cable company, a subscriber and an MDU owner that was created when the cable home wiring was first installed in the MDU. In Federal Communications Commission v. Florida Power Corporation, 480 U.S. 245, 107 S.Ct. 1107 (1987) ("Florida Power"), the United States Supreme Court ruled that the Pole Attachments Act, 47 U.S.C. § 224, does not cause a taking of property because the statute did not require the utility to give up pole space to a cable company. The cable home wiring rules likewise do not require the cable operator to give up its wires, it merely regulates the disposition of the wire after the cable operator has no need for it.

Second, such regulation is not a "taking" of property merely because it may place constraints on the use of the wire after the cable operator has no need for it. Florida Power; Warschauer Sick Support Soc. v. State of New York, 754 F.Supp. 305, 307 (E.D.N.Y. 1991) (New York law requiring cemetery plots to be offered for sale to the cemetery at original cost plus 4% before sold on the open market is not a taking of property.) See also Yee v. City of Escondido, Cal., 112 S.Ct. 1522 (1992). Like the Pole Attachment Act discussed in Florida Power, the cable inside wiring rules, as applicable to MDUs, merely regulate the terms and conditions of a relationship that had been previously and voluntarily entered into between the relevant parties.

12/ Time Warner raised this issue in the context of Liberty's Petition for Clarification. However, the length of the wire subject to the cable home wiring rules or the demarcation point is irrelevant for purposes of the takings issue raised by Time Warner.

VI. Time Warner Has Used The Judicial Process To Frustrate Competition From Liberty.

Aside from the above-described physical barriers which Liberty faces in accessing the cable inside wiring in many MDUs, Liberty's competitors have used the judicial process to intimidate potential Liberty customers. Time Warner claims, erroneously, that Liberty "often misappropriates" Time Warner's wires. The truth is that Time Warner frequently claims ownership and control over wires it does not own and then files multimillion dollar lawsuits over that wiring in a baseless attempt to scare away Liberty's customers. Set forth below are a few such examples.

- **Paragon Cable Manhattan v. 180 Tenants Corporation and Douglas Elliman-Gibbons & Ives, Inc.**, Supreme Court of the State of New York, County of New York, Index No. 6952/92. Time Warner sued this 155 unit co-op for over $1 million in damages when the co-op signed a contract with Liberty. Time Warner claimed exclusive control over the building's (not Time Warner's) master antenna system ("MATV") even though Time Warner's New York City franchise and state law prohibits such exclusivity. All of the building's residents wanted to switch to Liberty. The co-op had to solicit the intervention and mediation of the New York State Commission on Cable Television which encouraged Time Warner to relinquish control of the MATV, construct its own separate system to the co-op's aesthetic specifications and dismiss its damage claims. Liberty's service was delayed eight months while this settlement was concluded. During that time, other co-op boards believed they would suffer the same fate as 180 East End Avenue if they signed up with Liberty.

- **Manhattan Cable Television, Inc. v. Fifty-First Beekman Corp.**, Supreme Court of the State of New York, County of New York, Index No. 92-16790. Time Warner sued this 109 unit co-op for over $1 million in damages when the co-op signed a contract with Liberty. This action came three months after the 180 Tenants Corp. lawsuit was filed. As with 180 Tenants Corp., Time Warner claimed exclusive control over the building's MATV. Liberty built a second, parallel system in the MATV conduits and the co-op produced, in court, signed statements from 100% of the building's full time residents asking to switch from Time Warner to Liberty. The court dismissed Time Warner's lawsuit but Liberty's service was still delayed four months while the second system was constructed and the court papers prepared and filed. Again, during that time, other co-

op boards believed they would suffer the same fate as Fifty-First Beekman if they signed up with Liberty.

- **In the Matter of the Application of Manhattan Cable Television, Inc. to Obtain Disclosure of the Board of Managers of the Horizon Condominium and Liberty Cable Company, Inc. to Aid in Bringing an Action Against The Board of Managers of the Horizon Condominium**, Supreme Court of the State of New York, County of New York, Index No. 12828/92. Time Warner sued this 441 unit condominium when it learned that the board was negotiating with Liberty. Time Warner took the position that it owned all the Individual Lines in the conduits running from the stairwells to the dwelling units. The condominium responded by showing that the condominium owned the conduits used by the Individual Lines. the condominium demanded that Time Warner remove "its" wire from those conduits so Liberty could install a new wire. The dispute was resolved by the condominium, Liberty and Time Warner agreeing that Liberty and Time Warner could both use the Individual Lines to serve their individual subscribers. A copy of that agreement is attached as Exhibit B. The agreement shows that Time Warner can, as a practical and operational matter, easily share the use of Individual Lines -- even long ones in concealed conduits -- when it wants to. But Time Warner has, since entering into this sharing agreement, sought to negotiate agreements with other building owners that would give Time Warner exclusive use of the conduits. Liberty has complained about this practice to the New York City franchising authority. A copy of Liberty's complaint to the New York City Department of Telecommunications and Energy is attached as Exhibit C.

- **Paragon Cable Manhattan v. P & S 95th Street Associates and Milstein Properties Corp.**, Supreme Court of the State of New York, New York County, Index No. 130734/93. Time Warner sued the owners of this 280 unit apartment building for over $1 million in damages claiming that the owners (who also have an interest in Liberty) conspired with Liberty to misappropriate the Individual Lines. The original electrician's contract for the building shows that the entire cable TV system for the building was installed by the owner's electrician at the owner's expense. Time Warner nonetheless claims ownership of all cable television wire in the building and has been sabotaging and cutting Individual Lines to prevent Liberty from using them. Liberty expects that Time Warner will soon be asking a New York State court to adopt Time Warner's

wallplate demarcation point under the existing cable home wiring rules.

- **10 West 66th Street Corporation v. Manhattan Cable Television, Inc.**, Supreme Court of the State of New York, County of New York, Index No. 10407/92. This action was started by a 279 unit co-op seeking to enjoin Time Warner from interfering with the upgrade of the building's MATV so Liberty could provide service. Time Warner responded by claiming ownership over vaguely defined "facilities" and asserting a $1 million counterclaim for the co-op's interference with these "facilities." This case is still pending.

- **Manhattan Cable Television v. 35 Park Avenue Corp., WPG Residential, Inc. and Williamson, Picket, Gross, Inc.**, Supreme Court of the State of New York, County of New York, Index No. 23339/92. Time Warner sued this 145 unit co-op for over $1 million in damages after the co-op signed a contract with Liberty. The complaint was patterned on the 180 Tenants Corp. and Fifty-First Beekman Corp. complaints. This case is still pending.

The above-described Time Warner suits and counter-suits are bizarre examples of a supplier litigating with its customers to prevent the customer's election to do business with a competitor. This terror tactic will stop if the Commission adopts Liberty's demarcation point for MDU cable home wiring. A demarcation point where an Individual Line meets the Common Lines will moot any "ownership" dispute over Individual Lines. But Time Warner's litigation threat will only get worse if the Commission adopts the Time Warner demarcation point because ownership of Individual Lines beyond the wallplate will remain an open issue to be determined state by state under the common law of fixtures.

* * * * *

Liberty respectfully requests that the Commission reconsider its demarcation point for cable inside wiring in MDUs.

Respectfully submitted,

LIBERTY CABLE COMPANY, INC.

GINSBURG, FELDMAN AND BRESS
CHARTERED

By: _____

Henry M. Rivera
Jay S. Newman
Suite 800
1250 Connecticut Avenue, NW
Washington, DC 20036
202-637-9000

W. JAMES MACNAUGHTON

_____

90 Woodbridge Center Drive
Suite 610
Woodbridge, NJ 07095
908-634-3700

ATTORNEYS FOR
LIBERTY CABLE COMPANY, INC.

Exhibit A

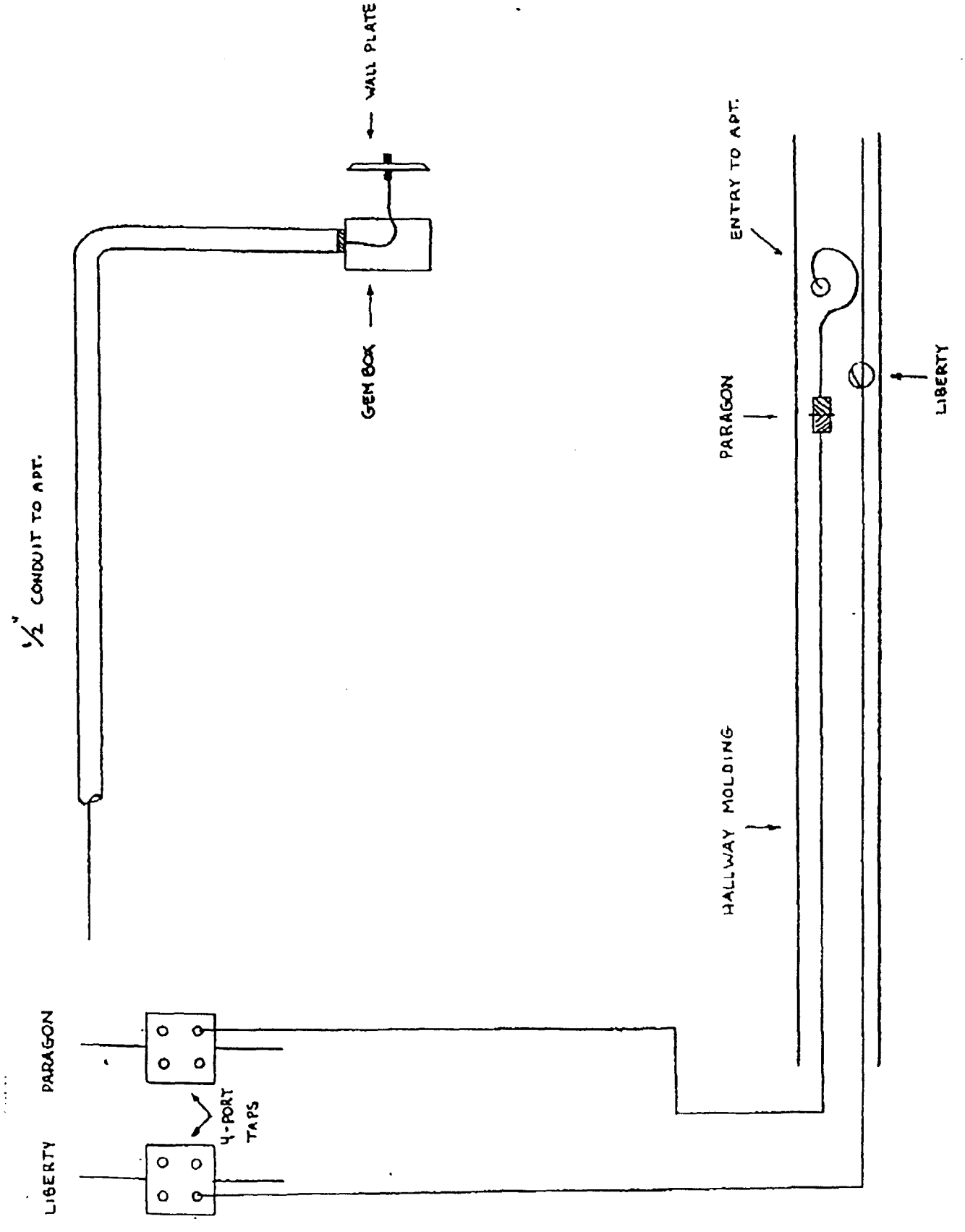
WALL PLATE
GEM BOX
½" CONDUIT TO APT.
ENTRY TO APT.
PARAGON
LIBERTY
HALLWAY MOLDING
LIBERTY
PARAGON
4-PORT TAPS

EXHIBIT B

AGREEMENT

This Agreement is made as of the 16th day of ~~October~~ November, 1992 by and among Time Warner Cable of New York City, a division of Time Warner Entertainment Company, L.P. ("TWCNYC"), The Board of Managers of the Horizon Condominium (the "Board"), a residential apartment building located at 415 East 37th Street, New York, N.Y. (the "Building"), and Liberty Cable Company, Inc. ("Liberty").

W I T N E S S E T H :

WHEREAS, TWCNYC, a franchised cable television company, has installed, used and maintained, at its expense, a cable television signal distribution system at the Building, including, but not limited to, vertical riser cables, pull boxes, amplifiers, directional couplers and splitter networks, wall plates and home run cables (collectively, the "Existing System");

WHEREAS, in the Existing System, the home run cables are connected to the vertical riser cables through directional coupler and splitter networks and carry TWCNYC's cable television signal from the directional coupler and splitter networks to the individual apartments at the Building (these home run cables are hereinafter collectively, the "Home Runs");

WHEREAS, the Board has contracted with Liberty for Liberty to provide Liberty's SMATV television service to residents of the Building who want Liberty's service rather than TWCNYC's service (collectively, the "Liberty Residents"), and to that end, Liberty has installed or will install a system,

including vertical riser cables, splitters and other equipment, to distribute its SMATV signal to the apartments at the Building;

WHEREAS, Liberty and the Board would like Liberty to use the Home Runs that run to the apartments of the Liberty Residents for the purpose of distributing Liberty's SMATV signal to the Liberty Residents for so long as such residents want to receive Liberty's SMATV service rather than TWCNYC's cable service;

WHEREAS, it is the position of TWCNYC that it owns the Existing System, including the Home Runs, and that neither Liberty nor the Board has any right to use or authorize the use of the Home Runs or any other element of the Existing System, and it is the position of the Board that the Home Runs are fixtures of the Building and that the Board may authorize Liberty to use them;

WHEREAS, notwithstanding these differing positions, each of Liberty and the Board represents that it will not interfere with the provision of TWCNYC's cable service to any resident of the Building who wants TWCNYC's cable service, either now or in the future; and

WHEREAS, in order to avoid the time and expense of litigation and without admitting the validity of the positions stated by any other party hereto, TWCNYC, Liberty and the Board wish to resolve this dispute in the manner set forth below.

NOW, THEREFORE, the parties agree as follows:

1. Liberty may use the Home Run running to the apartment of each Liberty Resident as to which a written form approved by TWCNYC requesting termination of TWCNYC's cable service and signed by the Liberty Resident has been received by TWCNYC but only for so long as such resident wants to receive Liberty's SMATV service rather than TWCNYC's cable service.

2. TWCNYC will schedule disconnect appointments for each apartment as to which such signed written form has been received by TWCNYC. The appointments shall be scheduled in an orderly manner. During the appointments, TWCNYC technicians will disconnect the appropriate Home Runs from the Existing System, install locking terminators, if appropriate, and permit Liberty technicians to connect the Home Runs to the Liberty system. During the appointments, TWCNYC technicians will also collect and remove its equipment, as appropriate, including, without limitation, any converter boxes, A/B switches and remote controls. Neither Liberty nor the Board will remove TWCNYC equipment from apartments or disconnect TWCNYC's cable service. TWCNYC, Liberty and the Board will cooperate with each other to minimize delays during the appointments. Nothing herein shall prevent TWCNYC from using normal disconnect procedures with any resident who contacts TWCNYC directly.

3. Neither Liberty nor the Board will interfere with the provision of TWCNYC's cable service to any resident of the Building who wants it, either now or in the future. TWCNYC may resume use of any Home Run upon request for TWCNYC's cable

service by a resident whose apartment is served by such Home Run. Without limiting the generality of the two preceding sentences, neither Liberty nor the Board will use, damage, disconnect or remove any element of the Existing System or otherwise interfere with or prevent TWCNYC's access to the Existing System or TWCNYC's use or maintenance thereof, except as expressly permitted by paragraph 1 above.

4. This agreement and the rights and obligations imposed herein shall continue in full force and effect, and shall inure to the benefit of and remain binding upon the parties hereto and their respective successors and assigns for so long as TWCNYC or any successor or assign is a franchised cable television company.

5. The parties shall keep this agreement (and its contents) strictly confidential and may use or disclose it only to the extent necessary to enforce it in a court of law.

6. No amendment, modification or waiver of this agreement shall be binding or effective unless it is embodied in a written instrument signed by all of the parties hereto.

7. Unless the context otherwise specifically requires, words importing the singular include the plural and vice versa. The terms "hereto" and "herein" and similar terms relate to this entire agreement and not to any particular paragraph or provision of this agreement.

IN WITNESS WHEREOF the parties hereto, intending to be legally bound thereby, have executed this agreement.

Time Warner Cable of New York City, a division of Time Warner Entertainment Company, L.P.

By: _____
Title: Sr. VP Eng. Tech Ops

Liberty Cable Company, Inc.

By: _____
Title: President

Board of Managers of the Horizon Condominium

By: _____
Title: President

EXHIBIT C

W. JAMES MacNAUGHTON, ESQ.
Attorney at Law
90 Woodbridge Center Drive • Suite 610
Woodbridge, New Jersey 07095

Phone (908) 634-3700
Fax (908) 634-7499

June 22, 1994

Ms. Eileen Huggard
Department of Telecommunications
and Energy
City of New York
75 Park Place, 6th Floor
New York, NY 10007

Re: Complaint Against Paragon Cable Manhattan

Dear Ms. Huggard:

I represent Liberty Cable Company, Inc. ("Liberty"). I am writing on behalf of Liberty to complain about a violation by Paragon Cable Manhattan ("Paragon") of its New York City Franchise obligations, Executive Law § 828, and the Cable Home Wiring provisions of the Federal Communications Commission, 47 C.F.R. § 76.802. Paragon has been proposing to building owners in its franchise area an illegal Cable Installation Agreement (the "Agreement"), a copy of which is enclosed. The Agreement provides that Paragon will install a conduit system in a new building under construction (the "Conduit System"). The Conduit System will, upon completion, be owned by the building owner and used by Paragon to provide cable television service to building residents. However, Paragon will be the sole and exclusive user of the Conduit System. The Agreement provides at ¶ 4(b) that "Paragon's right and privilege to utilize, and install equipment or facilities in, the Conduit System, including inside any junction boxes, pull boxes, lock boxes or gem boxes appurtenant to the Conduit System, shall be exclusive, and owner shall not permit any other person to utilize, or install equipment or facilities in or appurtenant to, the Conduit System without Paragon's prior written consent."

The effect of Paragon's exclusive control of the Conduit System is that Liberty and other multichannel video programming distributors ("MVPD's") are precluded from ever providing competing cable television service at buildings subject to the Agreement. A competing MVPD unable to use the Conduit System will have to core drill stairwells and hallways to construct a new and redundant conduit system—a process building owners will not tolerate. Moreover, the expense of a redundant conduit system will make it economically impossible for Liberty or any other MVPD to provide a competing cable television service.

The cost of constructing a redundant conduit system can be ameliorated somewhat by the use of hallway molding. However, it has been Liberty's experience that building owners loathe hallway molding and will not, if given the choice, allow its installation. Liberty's experience has been confirmed by numerous co-ops that have vigorously resisted the installation of hallway molding in their buildings by Paragon and Manhattan Cable. See In the Matter of the Application of 86th Street Tenants Corp., Fifty-First Beekman Corp., 19 East 88th Street, Inc., 145 East 84th Street Owners Corp., 650 Park Avenue Corp., 45 East 72nd Street, Inc., Phoenix Owners Corp. and 555 Park Avenue, Inc. v. The New York State Commission on Cable Television, Paragon Cable Manhattan and Time Warner of New York City, New York Supreme Court, New York County, Index No. 105358/93. Unlike Paragon, Liberty is not able to force unwanted hallway molding on a building owner pursuant to Executive Law § 828.

Paragon's exclusive control of the Conduit System violates Executive Law § 828(3) which prohibits the building owner and Paragon from entering into any agreement "that would have the effect, directly or indirectly of diminishing or interfering with existing rights of any tenant or other occupant of such building to use or avail himself of master or individual antenna equipment." The building resident's right to choose his or her own provider of cable television service is paramount under both state and federal law. The Agreement illegally prevents the exercise of the consumer's fundamental right to choose by controlling the conduit through which that choice is exercised.

Paragon tries to justify its exclusive control over the Conduit System by paying for the installation. However, Paragon has a statutory and Franchise obligation to pay for the installation of the Conduit System even in the absence of any exclusive agreement. See Executive Law § 828(1)(a)(ii), and Paragon's Franchise at Section 3. Paragon is specifically barred by Executive Law § 828(1)(b) from receiving or demanding any consideration from a building owner in exchange for installing the Conduit System in the building. Such prohibited consideration includes receiving or demanding the exclusive right to use the Conduit System.

Paragon's exclusive control of the Conduit System precludes building residents from taking advantage of the federal Cable Home Wiring rules in 47 C.F.R. § 76.802. Under the Cable Home Wiring rules, Paragon must, upon the termination of Paragon service, offer to sell its former subscriber sufficient cable within the Conduit System to permit a competing MVPD to provide service. The purpose of this requirement is to promote the

introduction of competing cable television service by other MVPD's. See Report and Order, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Cable Home Wiring, MM Docket No. 92-260, FCC 93-73, Adopted February 1, 1993 and Released February 2, 1993.

The effect of Paragon's exclusive control of the Conduit System renders the Cable Home Wiring rules a nullity. A subscriber may, in theory, be able to purchase Paragon's cable in the Conduit System but no other MVPD will be able to connect to that cable because Paragon controls the conduit in which the cable is located. Furthermore, the Agreement expressly provides in ¶ 5 that building residents may not acquire any interest in their Cable Home Wiring and that Paragon can remove Cable Home Wiring from the building upon the termination of service.

The Agreement violates Appendix B, § I(B)(2) of the Franchise which provides "the installation of all cables, wires, or other component parts of the system in any structure will be undertaken in a manner which does not interfere with the operation of any existing MATV, SMATV, MDS, DBS, or other distribution system in said structure, including any conduit used in connection with such other system." (emphasis added) This provision expressly prohibits Paragon from interfering with the shared use of conduits by competing MVPD's.

Paragon's New York City Franchise requires at § 3.2.01 that Paragon "shall [not] discriminat[e], nor permit discrimination between or among any persons, in the availability of services or the rates, terms and conditions thereof." The Agreement discriminates between different building owners and for that reason alone is illegal. The Agreement is a radical departure from Paragon's past installation practices at new buildings under construction. Paragon has not claimed the exclusive right to use conduit systems in new buildings constructed during the 1980's. A careful investigation and examination of Paragon's installation and construction practices—both past and present—will show that the Agreement is discriminatory in violation of § 3.2.01 of the Franchise.

The Agreement violates § 3.3 of the Franchise which provides that Paragon "shall not interfere in any way with, or utilize, any master antenna systems, satellite master antenna system, or any other similar system within any building." Paragon's exclusive control of the Conduit System precludes the installation of competing MVPD systems. Indeed, it was clearly intended to achieve precisely that end. If Paragon were truly

concerned about interference with its equipment by other users of the Conduit System, it could simply install larger conduit.

The Agreement violates § 8.3 of the Franchise which provides that Paragon "shall not interfere with the ability of each subscriber to utilize his or her television receiver for any normal purpose." In light of the Cable Home Wiring rules, the "normal purpose" of subscribers' television receivers now extends to interconnecting with competing MVPD's. That normal purpose is frustrated by Paragon's exclusive control of the Conduit System.

Liberty respectfully requests that your office investigate the use of the Agreement by Paragon and order the following remedial action: (1) direct Paragon to immediately cease using the Agreement; (2) nullify any executed Agreements, (3) require Paragon to install conduit and appurtenant hardware (e.g. lock boxes) only on a non-exclusive basis and of sufficient size and diameter to accommodate the installation of cable, splitters and associated hardware by at least two (2) other MVPD's and to notify your office and Liberty of such installations at least ninety (90) days in advance. Your prompt attention to this matter and cooperation is appreciated.

Sincerely,

W. James MacNaughton

WJM:lw
Enclosure
cc: John Rigsby, President, Paragon Cable Manhattan
William Finneran, Chairman
New York State Commission on Cable Television
Oliver Koppel, Esq.
New York Attorney General
The Hon. Rudolph Guiliani, Mayor
The Hon. Ruth Messinger, Manhattan Borough President
Susan Kassapian, Esq., Assistant Commissioner
Department of Consumer Affairs

CABLE INSTALLATION AGREEMENT

AGREEMENT dated as of _____, 1994 (the "Effective Date") between PARAGON COMMUNICATIONS, a Colorado partnership, d/b/a Paragon Cable Manhattan, and having an office at 5120 Broadway, New York, New York 10034 ("Paragon") and _____, a _____, having an address at _____ ("Owner").

W I T N E S S E T H:

WHEREAS, Owner is (and hereby warrants to Paragon that it is) the sole owner of certain real property located in the County, City and State of New York designated as Block Lot on the Tax Map of New York County and more particularly described in metes and bounds on Exhibit 1 hereto;

WHEREAS, Owner is currently constructing certain buildings, fences, walls and other structures and improvements (collectively, the "Building") upon said real property to be commonly known by street address of New York (hereinafter, the "Premises");

WHEREAS, Paragon is in the business of providing cable television and other services within areas including the Premises in accordance with the terms of its franchise agreement with the City of New York (such franchise agreement, as the same hereafter may be supplemented, amended, extended or renewed, the "Franchise Agreement") and otherwise as permitted by applicable provisions of federal, state and local law;

WHEREAS, concurrent with the construction of the Building, Owner desires to provide for the construction of an internal conduit system, including vertical conduits and horizontal conduits to each unit in the Building, as more particularly described on Exhibit A annexed hereto, suitable for use by Paragon in providing franchised cable television and other services to residents of the Building (the "Conduit System");

WHEREAS, Owner has requested that Paragon cooperate with Owner while the Building is in development and prior to the Building's occupancy by any tenants and that Paragon during such period (A) design and install the Conduit System in the Building, and (B) install (i) wires and cables and other components of Paragon's cable television system inside the Conduit System and (ii) such other equipment, including, without limitation,